IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1510

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

ROBERT HORTON, as next friend of ROBBY HORTON and SANDRA SANCHEZ, on their own behalf and on behalf of all others similarly situated,
Respondents

SUPPLEMENTAL APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-718

(Filed May 1, 1981)

ROBERT HORTON, et al,
Plaintiffs

v.

GOOSE CREEK INDEPENDENT
SCHOOL DISTRICT,
Defendant

FINAL JUDGMENT

This action came before the Court on cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56 and the issues having been duly considered and a decision having been duly rendered for the reasons stated in this Court's Memorandum and Order of even date, it is hereby

ORDERED, ADJUDGED, and DECREED that:

(1) Plaintiffs' Motion for Class Certification is DENIED; and

(2) Defendant's Motion for Summary Judgment is GRANTED.

SIGNED this the 1st day of May, 1981.

/s/ ROBERT O'CONOR, Jr.
Robert O'Conor, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-718

(Filed May 1, 1981)

ROBERT HORTON, et al,
Plaintiffs

v.

GOOSE CREEK INDEPENDENT
SCHOOL DISTRICT,
Defendant

MEMORANDUM AND ORDER

Robert Horton, Robby Horton, Heather Horton, and Sandra Sanchez have brought this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief individually, and on behalf of a class of students currently enrolled in the Goose Creek Independent School District in Harris County, Texas. This case is before the Court on plaintiffs' class allegations pursuant to Fed.R.Civ.P. 23 and cross-motions for summary judgment pursuant to Fed.R.Civ.P. 56. On Thursday, October 29, 1980, the parties appeared through their respective counsel and the class allegation issues, as well as, the merits were argued to the Court. After considering the arguments of counsel and the record this Court denies plaintiffs' motion for class certification and grants defendant's motion for summary judgment for the following reasons.

Facts

This is a canine search case set in the public schools of Goose Creek Independant School District (GCISD). The GCISD covers a geographical area of 128 square miles in and around Baytown, Texas. It serves approximately 15,400 students through eleven elementary schools, four junior schools, two high schools, and two special schools. In 1978, the GCISD Board of Education, in response to a growing alcohol and drug abuse problem in their schools, approved a drug prevention program, implementing it in the 1978-79 school year. Part of that program includes the use of specially trained dogs which are used on random sweeps through all schools in the district, sniffing out contraband drugs or alcohol that might be concealed on the campuses.

The dogs used by the GCISD are trained and handled by Security Associates International, a Houston security services firm, which provides trained dogs for other Texas school districts. This firm chooses non-aggressive dogs and trains them to "alert" on approximately sixty different illicit substances. The dog is then taken to a school campus where it is allowed to sniff the air around parked automobiles, student lockers and the students themselves while they are sitting in their classroom. When the dog's handler receives the "alert," which may be manifested in several ways, he notifies the school officials and the suspected vehicle, locker or person is searched for the controlled substance.

When a student is alerted on, he or she is taken to the administrator's office and a body search is conducted. This search is confined to outer garments, pockets, belts, collars, shoes, and socks. When contraband is found in

violation of the school district's policy, the student's parents are notified and one of two procedures is initiated. After an initial violation the student is given an option of seeking outside third-party counseling or, if this is refused, the administrator in charge may recommend to the superintendent that the student be suspended from school. If the former alternative is chosen, a letter is given to the violator setting out the counseling agreement and the consequences of future violations. When the latter alternative is chosen, a due process procedure of notice and a hearing is provided. Second time violators are not given a choice: the administrator makes a recommendation for suspension to the superintendent. When nothing is found by the search, an apology is made to the student and he or she is allowed to return to class.

Where the dog alerts on an automobile, the student driver is asked to open the car, and if he or she refuses, the parents are notified. Lockers alerted on are searched without consent. Contraband found in lockers or cars is considered a violation of the school policy and is treated in the same manner as contraband found in the student's clothing.

Schools are searched on a random and unannounced basis. Generally, a specific dog and its individual trainer are always used in the GCISD. While in the classroom, the dog is leashed and the procedure progresses quickly. In elementary schools, programs are conducted prior to the use of dogs on campus, demonstrating to the students that the dog is nonthreatening and friendly. In the higher grades, students are informed generally about the program but are not notified of the time the dog will inspect their school.

Individual plaintiffs Robby Horton, Heather Horton, and Sandra Sanchez are all students in the GCISD and were subjected to the use of "sniffer dogs" in furtherance of the school district's drug prevention policy. Both Robby Horton and Sandra Sanchez were alerted on and subsequently searched in the administrator's office. On January 10, 1980, the sniffer dog alerted on Sandra Sanchez. She was asked to the administrator's office where she was questioned and her purse was taken from her and searched without consent. All that was found was a small bottle of perfume and she was allowed to return to class. Robby Horton was also alerted on and taken to the administrator's office. There he was given an opportunity to call his parents, but they could not be reached. He was then asked to empty his pockets and he complied. Subsequently, his socks and lower pant legs were searched but no contraband was found and he was sent back to his class. While Robby's sister, Heather, has been subjected to the canine sniff inspections she has never been alerted on and her clothing has never been searched by school administrators.

Class Allegations

In order to maintain a class action plaintiff bears the burden of proving each element of Fed.R.Civ.P. 23(a) and at least one of the elements in Fed.R.Civ.P. 23(b). *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). Rule 23(a) requires: (1) that the individuals in the proposed class be so numerous that joinder of all is impracticable; (2) that a common question of law and fact exists across the proposed class; (3) that the claims of the representatives are typical of those of the class as a whole; and (4) that the representative parties fairly and adequately protect the interest of

the class. Plaintiffs seek to represent the 15,400 students currently enrolled in the GCISD. However, bald assertions will not support the requirements of proof necessary to satisfy Rule 23(a) and this Court must deny plaintiffs' motion for class certification. *See Rodriguez, supra; Aiken v. Neiman-Marcus,* 77 F.R.D. 704, 705 (N.D. Tex. 1977).

Constitutional Claims

Plaintiffs allege that the enforcement procedures under the district's drug prevention program violate the Fourth Amendment to the United States Constitution which secures all persons from unreasonable governmental searches. It is alleged in this case that the utilization of a canine inspection and the resulting searches of clothing, lockers, and automobiles represent unreasonable intrusions prohibited by the Fourth Amendment. Since questions of law and not material issues of fact are contested, this case is properly decided on cross-motions for summary judgment.

The traditional Fourth Amendment analysis has two steps: the activity must be shown to be a governmental search of a constitutional dimension; and it must be shown to be unreasonable. Undeniably, the acts complained of in this suit were governmental in nature, since they were executed in accordance with the formal school district policy adopted by the GCISD Board of Education. Actions by a school board in alleged violation of the Fourteenth Amendment make it amenable to suit under 42 U.S.C. § 1983. *Kingsville ISD v. Cooper,* 611 F.2d 1109, 1112 (5th Cir. 1980).

It is well settled that, as a general proposition, students do not shed their constitutional rights when they enter the

schoolhouse door. *Tinker v. DesMoines School District*, 393 U.S. 503, 511 (1969) (First Amendment rights); *In re Gault*, 387 U.S. 1 (1967) (students entitled to due process guarantees). However, the extent to which the Fourth Amendment applies to school searches is not clear. *Compare Bilbrey v. Brown*, 481 F.Supp. 26 (D. Ore. 1979) (warrantless school search reasonable) *with Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y. 1977) (warrantless school search unreasonable). This Court finds the better rule of law to be that, in school cases, students are protected by the Fourth Amendment but the doctrine of *in loco parentis* lowers the standard used to determine the reasonableness of the search. *Lund, supra*, at 52; *Moore v. Student Affairs Committee of Troy State University*, 284 F.Supp. 725, 729 (M.D. Ala. 1968).

Plaintiffs argue that sweeping indiscriminate canine inspections of lockers, cars, and the students themselves constitute searches under the Fourth Amendment. Only two cases have dealt with the constitutionality of canine inspections in the school setting and they have come down on opposite sides of this issue. In *Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980) the use of dogs was held not to be a search. 475 F.Supp. at 1019. Relying on *Katz v. United States*, 389 U.S. 347 (1967), the district court concluded that students do not have a justifiable expectation of privacy to preclude school administrators from sniffing the air around students and their desks with the aid of a trained drug detecting canine. 475 F.Supp. at 1022. Because a lower expectation of privacy exists in a closely supervised classroom setting, the Court ruled that there can be no search of a constitutional magnitude.

Recognizing that under the doctrine of *in loco parentis* the schools have the right to reasonably inspect students in order to provide a safe educational environment, the district court balanced the interests involved and found no constitutional violation. 475 F.Supp. at 1022. The Seventh Circuit subsequently adopted the district court's opinion regarding this issue. *Doe v. Renfrow*, 631 F.2d 91, 92 (7th Cir. 1980).

In *Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980), the district court in an almost identical factual setting to the case *sub judice*, found the use of "sniffer dogs" in a school setting to be an unreasonable search in violation of the Fourth Amendment. Analogizing, two electronic "beeper" cases, *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), and *United States v. Michael*, 622 F.2d 744 (5th Cir. 1980), which held non-intrusive aids to human senses to be violative of the Fourth Amendment, the *Jones* court found a "sniffer dog" to be an invasion of a student's reasonable expectation of privacy and an unconstitutional search. While the Court recognized a lower standard of reasonableness in an *in loco parentis* setting, the use of dogs in an indiscriminate search was held to be unreasonable in light of the facts of that case. 499 F.Supp. at 236.

This Court concludes that the use of dogs in the Goose Creek Independent School District constitutes a search, however, it disagrees with the *Jones* court with respect to the reasonableness of such activity. School districts operate *in loco parentis*, because the law recognizes that elementary and secondary school students have not achieved adult maturity. *Brown, supra*, at 28. *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App.—Austin 1970, no writ).

Thus, Texas school districts are empowered with broad discretion to enact regulations and rules to maintain a healthy and safe educational environment. *See Tex. Ed. Code Ann. Section 23.26* (Vernon 1972). So long as the district is pursuing this legitimate interest, the Fourth Amendment does not require a warrant to be obtained prior to a student search. *M. v. Board of Education Ball-Chatham Community Unit School District*, 429 F.Supp. 288, 292 (S.D. Ill. 1977); *Bellnier v. Lund*, 438 F.Supp. 47, 53 (N.D.N.Y. 1977); *Doe v. Renfro*, 475 F.Supp. 1012, 1023 (N.D. Ind. 1979); *Brown, supra*, at 28. The *in loco parentis* doctrine lowers the standard for such searches from "probable cause" to "reasonable cause." When school officials have reasonable cause to believe that activity is occurring on a school campus which jeopardizes the health and safety of students, warrantless searches are justified in proper circumstances.

The scope of the warrantless search cannot be unlimited, but it must be broad enough to satisfy the school district's duty to protect the health and safety of its students. Students do have an interest in their privacy and this interest must be balanced against the interest of the school district. *Brown, supra*, at 28. Utilizing this balancing test, courts have uniformly held strip searches of children to be beyond the limits of permissible school inspection because of the unreasonably intrusive nature of such acts. *See* e.g. *Lund, supra*, at 53; *Renfrow, supra*, at 1024. The line between such unconstitutional and constitutional school activity is not bright, still, it must be determined under the facts of each case. Applying the foregoing analysis to the case before this Court, the canine sniff search program employed by the GCISD is

reasonable and does not violate the Fourth Amendment rights of its students.

Plaintiffs do not challenge the fact that school districts today are faced with an epidemic of drug and alcohol abuse among their students, instead, they challenge the means selected by the district to combat it. While situations can be conjured up in which the use of dogs could be so intrusive that it would be antagonistic to the school district's duty to provide a healthy educational environment for its students, the nature of GCISD's drug enforcement program, as applied, is reasonable. Dogs are not used on a daily basis on each school campus. In fact, only one dog and one handler are assigned to randomly spot-check different schools during the school year; thus creating a rapport between the students and the dog. Students in all schools in the district are informed of the drug policy and search procedure at the beginning of the school year. In elementary schools, where the possibilities for abuse are the greatest, auditorium programs are conducted to eliminate any fear in the students. Classroom inspections by the dog are handled swiftly, with the dog briskly walking down each row of desks. The educational time lost by a student is limited to about ten minutes per visit. While schools are visited frequently, searches of classrooms are not performed every time the dog is on campus. Thus, the intrusion of the dog into the classroom environment is minimal during the course of the school year.

A canine sniff search of the surrounding air has very little intrusive effect on the individual student. Each student is aware of the school district's policy prohibiting the possession of alcohol and other drugs on the school

campus. Moreover, each is inured to the traditional supervision needed in schools to maintain an atmosphere conducive to learning. Thus, the student's expectation of privacy in a school setting is clearly lower than that held off-campus. The intrusive effect of a dog sniffing the air around the student, his car, or his locker must be balanced against the school's duty to maintain a healthy and safe educational environment, the student's lowered expectation of privacy at school, and the minimal nature of such a search. This Court concludes that such a balancing test weighs in favor of the validity of the GCISD's canine school searches under the Fourth Amendment.

Plaintiffs argue that the dog is subject to error and that the potential of such error makes the use of canine searches unreasonable. This Court disagrees. While it is true that the dogs are not trained to differentiate between lawful and unlawful substances, any substance they alert on, if in the student's possession, is against school policy. For example, while possession of aspirin is not unlawful, school policy requires *all* drugs to be given to the school nurse and dispensed through her to the students. Thus, if a dog alerts on a student in possession of aspirin, the search is reasonable in light of the legitimate school drug and alcohol control program. Furthermore, any error attributable to impairment of the dog's olfactory capability, *e.g.* when the dog catches a cold, errs in favor of the student since the dog will be less able to detect odors.

Plaintiffs also attack the viability of the searches of the students' lockers, cars and clothing. Such searches have been routinely upheld by courts where reasonable cause exists that a student is violating or has violated school policy. *See e.g., Renfrow, supra,* at 1023. Here,

GCISD's policy requires the existence of reasonable cause prior to the search of students' clothing, cars, or lockers. Not only is there the generalized perception of a problem of drug and alcohol abuse, but these searches are not made unless the sniffer dog has alerted. This level of particularized cause to believe that school policy has been violated makes a warrantless search in the school setting justified under the doctrine of *in loco parentis.*

Finally, the plaintiffs assert that the fear and humiliation attendant to these searches has deprived them of life and liberty in violation of the Fifth Amendment. As this Court has found, the GCISD program as applied, subjects the students to minimal intrusion, humiliation, and fear. In fact, the district goes to great lengths to assure that student apprehension is minimized. Plaintiffs' claim does not, therefore, rise to a constitutional magnitude. Therefore, it is

ORDERED, ADJUDGED, and DECREED that

(1) Plaintiff's Motion for Class Certification is, hereby, DENIED; and

(2) Defendant's Motion for Summary Judgment is, hereby, GRANTED.

SIGNED this the 1st day of May, 1981.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge